



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:**        BMY, Division of Harsco Corporation  
**File:**            B-233081; B-233081.2  
**Date:**            January 24, 1989

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### **DIGEST**

1. A bidder's delinquent contract performance at one facility properly may be considered by a contracting officer in making a determination of responsibility where the bidder intends to perform the new contract at a facility with no record of contract performance.
2. A contracting officer properly may base a determination of nonresponsibility on a negative preaward survey so long as it is based upon accurate information and conclusions.
3. Responsibility determinations are based on circumstances at the time of award and are inherently judgmental. Thus, the fact that different conclusions as to a firm's responsibility may be reached by others, does not demonstrate unreasonableness or bad faith on the part of the contracting officer.
4. A contracting officer may legitimately reconsider a nonresponsibility determination where there is ample time and there is a material change in a principal factor on which the determination is based.
5. Nonresponsibility determination does not constitute a de facto debarment from government contracting in violation of procedural due process, where the record indicates that the determination was based upon the protester's current lack of capability, not a lack of integrity or honesty, and there is no indication that future determinations will not be based upon the protester's capability at the time of the procurement involved.

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### **DECISION**

BMY, a division of Harsco Corporation, protests the award of a contract to Comar Industries, Inc., under invitation for bids (IFB) No. DAAK01-88-B-0117, issued by the Army Troop

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Support Command for 220 interior bays and 94 ramp bays for the Army's ribbon bridge system for use in troop training. BMY challenges the contracting officer's determinations that BMY was nonresponsible and that Comar was responsible.

We deny the protest in part and dismiss it in part.

The IFB provided for multiple awards, and when the original low bidder was allowed to withdraw its bid due to a mistake, Comar became the low overall bidder as well as low bidder on the ramp bays. BMY was low on the interior bay portion of the contract and so was in line for that part of the contract. Preaward surveys (PASs) were requested for both bidders and both resulted in recommendations of "no award."

The PAS team rated Comar satisfactory for technical, quality assurance, and financial capabilities and requested an accounting system review. Comar was rated unsatisfactory for production capability because it lacked an adequate facility and a firm commitment for such a facility. It was solely for this reason that Comar was recommended for "no award." Comar was then attempting to lease or otherwise obtain an adequate facility and the report noted that if it was successful, a supplemental report would be issued.

A PAS was conducted at both BMY's York, Pennsylvania and Salisbury, Maryland facilities. BMY was rated "satisfactory" on technical, production, and quality assurance capabilities at the Salisbury facility. That facility was unrated for its performance record because BMY had only recently acquired it from the prior ribbon bridge contractor and had not performed or completed any contracts there.

For the York facility, BMY was rated "satisfactory" for technical, quality assurance, and financial capabilities, but was rated "unsatisfactory" for production capability due to a poor performance record at that facility. In particular, the report set forth a delinquency record for a number of current and closed contracts administered by the Defense Contract Administration Services Management Area (DCASMA), Reading, Pennsylvania.

According to the PAS, 14 of 25 current contracts were delinquent due to the contractor's responsibility for inadequate production planning, inadequate subcontractor and vendor follow-up, material failures, and untimely purchasing to support contract schedules. The report specifically noted that BMY was delinquent on two similar bridge contracts in that original contract delivery dates had been exceeded for end item bridges and that contract data requirements list items were delinquent. With regard to

prior contracts during the past 12 months, the report noted that 30 were delinquent during the contract life, and 20 were completed in a delinquent status and time range due to the contractor's responsibility for inadequate planning and vendor shortages. The report continued that BMY was currently on the DCASMA, Reading Office's Contractor Improvement Program with a 40 percent delinquency rate. Further, the PAS monitor reported that BMY stated that no systems, procedures, or processes had been initiated or changed to alleviate the delinquency rate. While there was reportedly "continual contact with BMY management" by DCASMA to remedy the deficiencies, promises were "unfulfilled." The PAS monitor acknowledged that the Salisbury facility had been found satisfactory, but recommended "no award" based upon the unsatisfactory rating on production capability attributable to BMY's poor performance record at York.

The Comar PAS was dated September 23, 1988, and after reviewing it, the contracting officer contacted Comar and learned that it had not yet signed a lease. When Comar submitted a signed lease on September 28, the contracting officer requested the PAS team to survey the newly leased facility. Upon finding it adequate, the PAS monitor recommended award to Comar. The contracting officer found Comar responsible on the basis of the PAS and awarded it the contract on September 30. BMY's PAS was dated September 27 and after reviewing it, the contracting officer determined BMY nonresponsible based upon the recommendation of "no award." When it learned of the award to Comar, BMY filed its protest with our Office.

In support of its protest that the contracting officer erred in finding it nonresponsible, BMY disagrees with the findings of the PAS and argues that the survey was not conducted in accordance with applicable agency guidance and that it was inaccurate. BMY maintains that it should be judged solely on its potential at Salisbury and not on York's past performance; that recent affirmative findings of responsibility contradict the nonresponsibility determination; that it should have been given an opportunity to "cure" the negative PAS as was Comar; and that it has been de facto debarred by the agency's action. Based upon our review of the record, we disagree with BMY's assertions.

A contracting agency has broad discretion in making responsibility determinations, based on business judgment, since the agency must bear the brunt of any difficulties experienced in obtaining the required performance. Costec Associates, B-215827, Dec. 5, 1984, 84-2 CPD ¶ 626. We will not question a nonresponsibility determination unless the

protester demonstrates bad faith by the agency or a lack of any reasonable basis for the determination. Id.

BMY relies upon certain provisions of Defense Logistics Agency Manual (DLAM) 8300.1, "Production Manual for Contract Services" (August 1988), as support for its argument that the PAS was not properly conducted. At the outset, we note that according to its Foreword the manual provides "internal DLA procedures designed to assist in the accomplishment of [certain] objectives" which are the responsibility of that agency. This manual, providing internal guidance reflecting DLA policy, lacks the force and effect of law, and therefore a failure to follow it does not provide a valid basis for protest. American Contract Services, Inc., B-225182, Feb. 24, 1987, 87-1 CPD ¶ 203. In any event, for the reasons stated below, we are not persuaded that the guidelines contained in the manual were not followed.

First, BMY notes that where certain conditions are present (e.g., Congressional interest, unresolved conflicts among survey team members, reports of borderline capability in any area) the PAS must be referred to a PAS Review Board, which was not done. DLAM 8300.1, Part 1-103g. We note that this section of the DLAM provides criteria that "may be used" by the PAS monitor to determine whether to refer a PAS to the review board and thus there is no requirement that such a referral be made. We also note that the chairman of the review board will determine how it will operate and the extent of board action. DLAM 8300.1, Part 1-103g(1). The Army denies that the board was required to review BMY's PAS and advises that the chairman of the review board determined not to review BMY's survey because it involved a performance factor. We find no reason to second-guess the chairman's exercise of discretion.

Second, BMY observes that a proper evaluation of a contractor's performance includes a detailed examination of the extent of any delay and a determination of the root causes for the delay. DLAM 8300.1, Part 1-103f(2)(e)(2)(b). BMY maintains that the PAS contains "only raw, uninformed assertions." BMY also notes that its delivery dates are to be adjusted by "excusable delays" as defined in the clause found at Federal Acquisition Regulation (FAR) § 52.249-14 (1984) and asserts that if a proper analysis of such delays had been conducted, it would have revealed government responsibility or other excusable delay.

Our review of the PAS report does not convince us that the PAS team violated the guidelines set forth in DLAM 8300.1. The PAS report, in accordance with DLAM 8300.1, Part 1-103f-(2)(e)(i), details the number of BMY's delinquencies, their

extent, and sets forth the causes. We find this is sufficient evidence that a proper performance evaluation was conducted. With regard to excusable delay, the report states that the delays recorded were due to the contractor's responsibility, and the protester's simple denial of responsibility, without more, does not establish government responsibility. In any event, whether prior performance deficiencies were excusable is a matter of contract administration and not for resolution under our Bid Protest Regulations. See 4 C.F.R. § 21.3(m)(1) (1988).

A contracting officer may rely on the results of preaward surveys in making responsibility determinations, but such a determination is unreasonable if it is not based on accurate information and conclusions from the preaward survey team. See Fairchild Communications & Electronics Co., 66 Comp. Gen. 109 (1986), 86-2 CPD ¶ 633. Thus, our Office will consider the accuracy of the preaward survey information relied upon in judging whether a negative determination of responsibility was reasonable. Decker and Co., et al., B-220807, et al., Jan. 28, 1986, 86-1 CPD ¶ 100. We have reviewed the PAS and BMY's submissions and do not find that the contracting officer's determination was unreasonable.

BMY takes issue first with the report of its delinquencies, denominating them as "statistical anomalies." As support for its actual delinquency rate, BMY has submitted a chart listing 46 open contracts, their total values, and the values of the delays, which establishes that the value<sup>1/</sup> of the delays is only 3.43 percent of the total value of all contracts. The Army observes that BMY's figures are deceiving because they include a number of contracts which are not monitored by DCASMA, while the 40 percent figure used by the survey team represents BMY (York) contracts managed by DCASMA. We agree with the Army. BMY, by using a different method of calculating delay, has not established that the Army's figures are inaccurate.

Second, BMY takes issue with the report's attribution to BMY of a statement "that no systems, procedures or processes have been initiated or changed to alleviate the delinquency rate." BMY maintains that the statement is taken out of context and actually was made in reference to its Salisbury facility, where no changes were anticipated because of the good performance by the prior bridge manufacturer at that location. BMY also questions the degree and type of contact

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<sup>1/</sup> We note that values of two delays are listed as "undefined" on contracts valued at \$18.9 million and \$17.8 million.

that it had with DCASMA to remedy the deficiencies. We have reviewed BMY's submissions and assertions regarding this matter and are unpersuaded that the PAS monitor's statements were inaccurate or quoted out of context.

As evidence of its responsibility, BMY relies upon the positive PAS report for its Salisbury facility and urges that it is improper to find it nonresponsible on the basis of a negative report regarding York. While the mere fact of unsatisfactory performance under a prior contract does not necessarily establish a lack of responsibility, the failure to perform properly and in a timely manner under a prior contract may provide a reasonable basis for a nonresponsibility determination. C.W. Girard, C.M., 64 Comp. Gen. 175 (1984), 84-2 CPD ¶ 704. In view of BMY's unproven record at Salisbury and the delinquencies noted regarding two similar bridge contracts, we find it was reasonable for the contracting officer to consider BMY's performance record at York in making a determination of nonresponsibility.

BMY also relies upon a positive report from a System Status Review (SSR) conducted by the Defense Contract Administration Services Region, Philadelphia, shortly after the nonresponsibility determination by the contracting officer. It further submits evidence that after this finding of nonresponsibility, it was found responsible for a different contract to be performed at the York facility. Responsibility determinations are based upon circumstances at the time of award; they are inherently judgmental, and the fact that different conclusions as to a firm's responsibility may be reached does not demonstrate unreasonableness or bad faith. See NJCT Corp., 64 Comp. Gen. 883 (1985), 85-2 CPD ¶ 342. In addition, our review of the SSR reveals that despite an overall "satisfactory" rating on "Production and Industrial Resources," the SSR's discussion of this factor related that BMY was deficient with regard to its delivery performance record; unsatisfactory in the area of "Contractor Schedule Performance"; and marginal in the areas of "Material Planning and Control" and "Production Scheduling." Further, the Army advises that the recent determination of BMY's responsibility concerns a continuation of work BMY has been performing and that a PAS of the York facility was negative, but overridden by the contracting officer. Under these circumstances we cannot conclude that the contracting officer's determination of nonresponsibility was unreasonable.

BMY further contends that it should have been given an opportunity like Comar was given to cure its nonresponsibility. While the FAR allows the contracting officer to discuss preaward survey information with the prospective

contractor, such discussions are not required. FAR § 9.105-3(b) (FAC 84-25). Thus, a contracting officer may base a determination of nonresponsibility upon the evidence in the record without affording an offeror the opportunity to explain or otherwise defend against the evidence, and there is no requirement that an offeror be advised of the determination in advance of award. Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158.2/ However, a contracting officer may and should reconsider an initial finding of nonresponsibility when two conditions are present: (1) there is ample time for the review; and (2) there occurred a material change in a principal factor on which the initial determination was based. Cosmodyne, Inc., B-224009, Nov. 18, 1986, 86-2 CPD ¶ 623.

It is clear from the record that both the conditions expressed in Cosmodyne were present vis a vis Comar, but not BMY. While Comar could "cure" its negative PAS by acquiring an adequate facility, BMY could not so easily cure its history of poor performance. Comar's lease of an adequate facility was a material change in the sole factor on which the "no award" recommendation was based and the contracting officer apparently believed there was sufficient time for a review of that facility. Conversely, BMY did not experience a comparable change in its performance history. We conclude that the contracting officer acted fairly and properly in having Comar resurveyed while not offering BMY an opportunity to "cure" its nonresponsibility.

In arriving at our conclusion, we have considered BMY's argument that under the holding in Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F. 2d 953 (D.C. Cir. 1980), it was a violation of due process amounting to a "constructive debarment" for the contracting officer not to have notified BMY of the grounds upon which it was perceived nonresponsible and for BMY to have had an opportunity to respond to them before adverse action was taken. We were presented with the same argument in Omeneco, Inc., B-218343; B-218343.2, June 10, 1985, 85-1 CPD ¶ 660, in which we distinguished court decisions such as Old Dominion

" . . . from situations involving a negative determination of responsibility on the basis of lack of capability, as here, because those decisions dealt with the plaintiff's constitutional interest to be free from a governmental

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2/ The protester has not persuaded us that Oertzen is inapplicable to this case.

defamation of reputation (a perceived lack of integrity) having an immediate and tangible effect on the ability to do business."

Here, unlike Old Dominion, in which the plaintiff had been denied multiple contracts based on a perception that it lacked honesty and integrity, the Army's nonresponsibility determination does not concern BMY's honesty or integrity but its production capability to perform one particular contract. Moreover, BMY received a contract award subsequent to the contracting officer's determination here which belies the assertion of a de facto debarment. Accordingly, we find no merit to BMY's position.

BMY's remaining protest grounds are that Comar failed to comply with the Walsh-Healey Act, that it is not responsible, and that it engaged in illegal and collusive activities.

We have consistently declined to consider protests challenging the legal status of a firm as a regular dealer or manufacturer within the meaning of the Walsh-Healey Public Contracts Act. See Stephan Wood Products, Inc., B-225631, Apr. 1, 1987, 87-1 CPD ¶ 369; 4 C.F.R. § 21.3(m)(9). As for the contracting officer's affirmative determination of Comar's responsibility, where, as here, there is no showing of fraud or bad faith on the part of procuring officials, we will not review such a determination. See Nationwide Glove Co., Inc., B-229690, Dec. 23, 1987, 67 Comp. Gen. \_\_\_, 87-2 CPD ¶ 624; 4 C.F.R. § 21.3(m)(5). With regard to BMY's allegation that Comar engaged in collusive bidding activities with another firm, we note that such matters, in the first instance, are to be considered by the contracting officer in the context of a responsibility determination, Connelly Containers, Inc., B-227539, July 14, 1987, 87-2 CPD ¶ 44. Moreover, since collusive bidding is a criminal offense, if the contracting officer suspects that there is collusion he should refer the matter to the Attorney General. Acme Products, Inc., B-231846, July 13, 1988, 88-2 CPD ¶ 47. In this case, the protester's allegations of collusion were not raised until after the contracting officer had determined Comar to be responsible and had made award to it. Although the agency is of the opinion that the evidence presented by the protester has not

established that there was collusion, in view of the serious nature of the protester's allegations, they have been referred to the appropriate investigative division.

Accordingly, the protest is denied in part and dismissed in part.

*for* *Seymour Spear*  
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General Counsel